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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 648

ANCEL EARP, PETITIONER

v.

H. C. JONES, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 148–152) is reported in 131 F. 2d 292.

JURISDICTION

The judgment of the Circuit Court of Appeals was filed October 30, 1942 (R. 152), and a petition for rehearing denied on December 10, 1942 (R. 166). The petition for a writ of certiorari was filed on January 12, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

The taxpayer purported to transfer to his wife a one-half interest in his insurance business, which they agreed thereafter to conduct as a partnership. However, he actually operated the business as theretofore, and continued to control the income therefrom. The question presented is whether the court below correctly held that all of such income is taxable to the husband.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

This case involves claims for refund of income taxes of $290.10 for 1937 and $1,475.65 for 1938. The facts, as stipulated (R. 19–27) and found by the District Court (R. 81–83), may be summarized as follows:

Beginning May 1, 1925, the taxpayer acquired the sole interest in and operated an insurance business at Oklahoma City (R. 22). On December 1, 1937, the taxpayer and his wife executed an instrument termed a "Waiver and Agreement" (R. 22, 27–29), providing in part that in consideration of a transfer and assignment to the wife of an undivided one-half interest in the insurance business, having a value of $75,000, the wife would release and waive all right in any claims to the taxpayer's

estate. The parties placed a value of $37,500 upon the interest in the business, and a value of $22,500 upon the wife's right to participate in the taxpayer's estate (R. 22, 28). On the same date the taxpayer executed a "Transfer and Conveyance" to his wife of an undivided one-half interest in the assets and properties of the insurance business, including accounts receivable, contract rights, and other assets (R. 12, 22, 29). On the same date, the taxpayer and his wife signed an instrument termed "Articles of Partnership" (R. 12–14, 23, 29), reciting, among other things, that each of the parties was the owner of a one-half interest in the assets of the business conducted in the name of Ancel Earp and Company; that both parties agree to conduct and operate said business as a general partnership, in the same name, commencing December 1, 1937, and to continue for a period of twenty-five years unless sooner terminated; that each shall participate equally in all of the profits of the partnership, except that if either partner should devote more time to the management and operation such partner may be paid extra compensation from the profits for such services; that each partner shall have an equal voice in the management and operation and shall participate equally in all profits and losses except as stated above; that each partner shall give such time, effort, skill, and endeavor as is necessary for the conduct of the enterprise, and

that all distributions of profits shall be made equally to the partners (R. 13–14).[1]

During the years 1937 and 1938 the taxpayer's wife was a housewife with two minor children. She contributed no personal service to the insurance business, and did not participate in the management of the business, which was managed by the taxpayer (R. 23). The books of the company contained an entry crediting her with $1,092.51 as her share of the profits for December, 1937, and also credited the taxpayer with the sum of $1,092.50, as his share (R. 24). The books reflected a credit to the taxpayer of a salary of $6,600 for 1938, and a credit of one-half of the remaining profit for that year in the sum of $10,040.64, and also showed a credit to the taxpayer's wife of a similar sum of $10,040.64 representing her share of the profits (R. 24).

Income taxes were reported and paid by the tax-

[1] Prior to December 1, 1937, the taxpayer, doing business as Ancel Earp and Company, had agency agreements with four insurance companies, which were canceled on that date and new agency agreements executed with three of the same companies on the same date. Agreements with two additional companies were entered into in 1938. These were signed "Ancel Earp and Company, by Ancel Earp, co-partner" (R. 23). The opening balance sheet for Ancel Earp and Company as of December 1, 1937, listed assets in the amount of $79,170.39, of which $20,754.13 was designated as insurance agency cost (R. 24). The opening entry of the books of the company as of December 1, 1937, contained a credit to the taxpayer's wife of $12,456.88 as capital, and a like amount to the taxpayer as capital (R. 25).

payer and his wife, for both years, upon the basis of a partnership (R. 19–21, 25–26). After taxation of all of the insurance income to the taxpayer (R. 20–21), he filed claims for refund which were disallowed (R. 21), and brought suit thereon in the District Court (R. 6–14).

The District Court found that on December 1, 1937, taxpayer "attempted to create a partnership with his wife in his insurance business" (R. 81–82); that his wife before or after that date was not personally engaged in the insurance business, but attended to her normal household duties as the taxpayer's wife and mother of his children; that the wife made no contribution to the purported partnership other than that which had been given to her by the taxpayer for the purpose of being placed in the partnership about to be formed; that after December 1, 1937, the wife had nothing whatever to do with the management and direction of the insurance business; that the books of the insurance agency were kept as a partnership; that for 1938 the taxpayer drew a salary of $6,600, the books showing that after such payment the profits of the business were equally divided between the taxpayer and his wife; that for 1938 the taxpayer borrowed from his wife the sum of $3,900 of her share of the profits as reflected by the books, for which, he testified, he gave his note which he said had not been repaid (R. 82); that prior to and after December 1, 1937, the income derived from the insurance agency

was used in the main for the general expenses of the family, and that after December 1, 1937, although the books were kept differently, actually there was little if any change in the management of the finances of the taxpayer and his wife (R. 82–83). The court concluded as a fact, from all of the evidence, that the transactions between the taxpayer and his wife on December 1, 1937, constituted an effort by the taxpayer to divide his income from the insurance agency between himself and his wife to reduce his income taxes. It concluded that the entire income was taxable to the taxpayer, and therefore dismissed the complaint (R. 83).

The court below affirmed the judgment of the District Court (R. 152), stating in its opinion (R. 148–152) that a careful examination of the record led to the conclusion that no substantial change was effected by the partnership arrangement (R. 150), that it was not created to carry on a new joint enterprise, that there was no new or different economic unit created, but that the taxpayer under "the cloak of a partnership" continued to do business in substantially the same way, unaffected by the alleged partnership, the real purpose of which was to minimize taxes (R. 151).

ARGUMENT

The decision below is in accord with the well established principle that one may not avoid liability for tax upon his income by a mere assignment of the bare right to receive it. *Lucas* v. *Earl*, 281 U. S.

111; *Helvering* v. *Horst*, 311 U. S. 112; *Helvering* v. *Eubank*, 311 U. S. 122; *Harrison* v. *Schaffner*, 312 U. S. 579. In such circumstances, the construction of the federal statute does not depend upon the legal rights of the parties, *inter sese*, or whether, under state law, the arrangements which they have entered into may technically bear the labels which they have affixed to those arrangements. Cf. *Griffiths* v. *Commissioner*, 308 U. S. 355; *Higgins* v. *Smith*, 308 U. S. 473; *Gregory* v. *Helvering*, 293 U. S. 465. And this principle has frequently been applied in the case of a so-called family partnership which does not represent a true joint enterprise. See, *e. g.*, *Mead* v. *Commissioner*, 131 F. 2d 323 (C. C. A. 5th); *Waldburger* v. *Helvering* (C. C. A. 2d), decided November 5, 1942 (1942 C. C. H., par. 9721); *Tinkoff* v. *Commissioner*, 120 F. 2d 564 (C. C. A. 7th), certiorari denied, 314 U. S. 581; *Covington* v. *Commissioner*, 103 F. 2d 201 (C. C. A. 5th); *Wickham* v. *Commissioner*, 65 F. 2d 527 (C. C. A. 8th); *Kasch* v. *Commissioner*, 63 F. 2d 466 (C. C. A. 5th), certiorari denied, 290 U. S. 644; *Cohan* v. *Commissioner*, 39 F. 2d 540 (C. C. A. 2d); cf. *Burnet* v. *Leininger*, 285 U. S. 136. The partnership provisions of the revenue laws were designed to apply to persons jointly conducting an enterprise,[2] and were no more in-

[2] Moreover, the arrangement herein was probably not even technically a partnership under Oklahoma law. Section 1 of Title 54 of the Oklahoma Statutes Annotated (Appendix *infra*, p. 10) defines a partnership as "the association of two

tended to furnish a device for tax avoidance than were the installment sales provisions which were involved in the *Griffiths* case.

Although it is true, as petitioner indicates (Pet. 8), that family partnerships have been recognized in some situations, particularly where the inactive spouse has contributed actual capital to the enterprise, those cases are not in conflict. Whatever may be said of the correctness of those decisions, they do not furnish sufficient ground for certiorari here.

CONCLUSION

The decision below is correct. There is no conflict. It is, therefore, respectfully submitted that the petition should be denied.

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or more persons for the purpose of carrying on business together * * *." The carrying on of business together is fundamental. Cf. *Karrick* v. *Hannaman*, 168 U. S. 328. Not only was the burden upon the taxpayer to overcome the Commissioner's determination (*Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160, 167), but it was incumbent upon him to prove the partnership he alleged (*Hawkins* v. *Mattes*, 171 Okla. 186, 191).